No. 11,992

IN THE

United States Court of Appeals

For the Ninth Circuit

POWER SERVICE CORPORATION (a corporation),

Appellant,

vs.

W. E. JOSLIN, dba CORY-JOSLIN and MACNSONS,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

RUDOLPH J. SCHOLZ,
Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 11,992

IN THE

United States Court of Appeals

For the Ninth Circuit

POWER SERVICE CORPORATION (a corporation),

Appellant,

vs.

W. E. JOSLIN, dba CORY-JOSLIN and MACNSONS,

Appellee.

BRIEF FOR APPELLEE.

BRIEF OUTLINE OF CASE.

A contract between the United States Government was entered into in the Spring or Summer of 1942 with Wm. S. Lazier, Inc.-Broderick and Gordon, hereinafter called the Architect Engineer Manager, which for brevity is called "A-E-M", to construct an ordnance works near Eudora, being located in Johnson County, Kansas, and called the Sunflower Ordnance Works. The A-E-M was the general contractor and the entire project (of which Power House No. 1 was only a small part) covered approximately 12,000 acres.

There were numerous subcontractors handling different phases of the work; one of these was W. E.

Joslin, an individual, doing business as Cory-Joslin and Macnsons, and whose subcontract covered for the most part the plumbing, heating and ventilating of the entire project.

The plans called for three power houses which were numbered 1, 2 and 3.

During the course of the project, Power Houses Nos. 2 and 3 were constructed and in operation; Power House No. 1 had progressed to a point where the outside building had been erected and a part of the equipment for the power house actually installed, when Washington issued a Directive to cease all operations on Power House No. 1. (The progress of the war by this time had reached a point where Washington deemed Power House No. 1 unnecessary.) However, most of the material for Power House No. 1 had been ordered and most of it had been delivered to the site for assembling and installation.

The Hercules Powder Company was to be the operator of the project when completed and at all times during the course of construction supervised and helped with the overall construction of the Sunflower Ordnance Works.

Hercules had procured from various sources most of the materials, if not all, for the power house.

For a period of approximately 9 or 10 months, no further work was done on Power House No. 1.

Each of the power houses was contained in a separate building and Power House No. 1 was in a build-

ing possibly 200x200 ft. in extent, and when completed was to contain three boilers.

Suddenly the war in Europe took a turn for the worse and explosives on hand and those in the course of production were not meeting war requirements. Orders from Washington were issued to immediately complete Power House No. 1.

As the work of completing Power House No. 1 was more nearly in line with the knowledge and experience of W. E. Joslin, as compared with other subcontractors on the project, he was directed to enter into a subcontract for the purpose of having the erection of the boilers in Power House No. 1 completed.

Specifications were prepared and bids were solicited. Power Service Corporation (hereinafter called PSC) was awarded the lump sum contract for $448,000.

After PSC had eliminated the other bidders, that company raised objections to signing the formal contract which was presented to them on the 11th day of July, 1944, and it was not formally signed by it until on or about the 7th day of September, 1944. However, it continued to operate under the contract from the time of its award to completion.

During the interval, PSC wanted changes made in the contract to permit it extra compensation should the time of completion be delayed, on the ground that certain materials that the PSC claimed were supposed to be at the site were not there.

There was finally added to the contract the following clause:

> "This contract is signed and executed by the Power Service Corporation without any *intent* on the part of the corporation to abandon or waive any right which it *may have* to submit, prove, and collect damages by reason of the *late delivery* of materials, *notwithstanding* the provisions of Par. *1-05,* of the specifications." (Italics ours.)

Before bids were received, each prospective bidder was *required and given* approximately three weeks' time to look over all of the available materials. PSC only spent parts of two days in viewing this material.

After the contract had been made but before formally signed, PSC claimed it discovered that certain water wall tubes and water wall headers were not at the site and had to be requisitioned for through Joslin. It is a fact that these water wall tubes and headers were not on the site; however, PSC admitted that these were expeditiously delivered, and as soon as possible by Joslin after requisitions were issued by PSC for them. PSC claims that the delay in having these materials furnished delayed the completion of the contract for 39 days.

PSC contended at the trial that the Par. 5-04, subpar. C, in the specifications which reads as follows: *"Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto",* actually implied that the water wall tubes and headers *were on the site;* that PSC was led to believe that such materials were there (*not by Joslin, however*); that Joslin believed they were there, and that therefore a mutual mistake of fact

occurred which by reason of the clause added to the contract (Page ....., line .....) entitled PSC to collect damages either on the contract or that the contract should be reformed and on the reformed contract PSC was entitled to damages.

The trial Court found that there was no mutual mistake, or any mistake, that the contract should not be reformed but that under the "clause" added to the contract PSC was entitled to collect certain damages for the said tubes and headers not being on the site, in the sum of $3,753.15.

As a matter of fact, W. E. Joslin had no knowledge of just what shortages in materials there were and was under no obligation or duty to have such knowledge, and the contract was purposely worded "Nearly all and etc." to cover any shortages that might develop. It was just common sense to believe that some shortages would develop under the situation.

In the very nature of the operations of a project as big as Sunflower, and in the desire to keep down unnecessary costs, it was natural that when the Directive to stop further work and cancel all outstanding orders not yet delivered or in transit on Power House No. 1 was received, and an indication that Power Houses No. 1 would not be needed, that some of the materials that had been delivered for that power house unquestionably were diverted to other and more urgent parts of the project or informally borrowed. Also, that some materials for Power House No. 1 were not delivered or received in view of the cancellation Directive.

For these reasons, not only was the contract worded with "Nearly all * * *", but also was worded to require the successful bidder to *immediately prepare an inventory* of all available and usable materials on the site, and as shortages developed *to requisition or place orders* for such shortages in sufficient time and detail *to enable Joslin* to procure the same.

THE PLEADINGS.

The complaint consists of three causes of action:

1. Breach of written contract.
2. Reformation.
3. If reformed, damages on the reformed contract.

The answer, besides setting up a denial, alleges that there is no consideration for the clause on the signature page of the contract, and that the appellant is barred by estoppel, Statute of Frauds, release and waiver. The trial Court found for appellant on the first cause of action and dismissed the second and third causes. It assessed damages against appellee in the sum of $3,753.15. The appeal is based only on the first cause of action.

QUESTIONS ON APPEAL.

The principal questions raised in this Court are:

(a) Is appellant entitled to damages;

(b) If so, was the trial Court in error in not awarding appellant more or less damages?

If there is sufficient evidence in the record to sustain the trial Court on both questions, it is our opinion that the trial Court's decision will be upheld as it had the benefit of seeing and hearing the witnesses and thereby judging their creditability, knowledge and veracity.

It is stipulated that PSC claim is only based upon an *alleged shortage of water wall tubes and headers.* (Tr. 659-660.)

IS THE APPELLANT ENTITLED TO DAMAGES?

The chronological events are as follows:

June 17, 1944—PSC received specifications.

July 18-19—Part of these two days only were spent by PSC in physical inspection of the project on which to base its bid. (Tr. 416.)

July 8—Bid submitted by PSC.

July 11—Contract accepted and awarded to PSC.

July 13—Notice to proceed received by PSC.

Aug. 17, 1944—Date of first requisition by PSC for tubes, etc. (App. Exh. 20, Tr. 449, 662-667.)

Sept. 7, 1945—First time PSC claimed Joslin breached contract. This was in a letter not addressed to him or his firm. (Tr. 434.)

Dec. 1, 1945—First time PSC advised it was going to file a claim. (Tr. 540.)

Mar. 18, 1946—Acceptance of final payment, except claim for $10,008.70, pending wlh. ch. of Eng.

The offer (July 8) and acceptance (July 11), which is also the date of the contract, *constituted the contract.* (84 Pac. 1000, 123 Pac. 191.)

Under the specifications (*1-05*) PSC acknowledged "* * * full satisfaction of any delays encountered and the constructor (Joslin) will not be liable for any costs or expenses incurred by the sub-constructor (PSC) as a result of the increased time for completion of the sub-contract."

In turn, appellant was not charged any penalty for delay on its part as is the custom in sub-contracts. Therefore, appellant has no case up to this point.

Appellant, however, ejects other elements into the case, which complicate the matter.

First: It claims that a clause on the signature page of the contract of July 11, 1944, but appended in September, nullifies 1-05 insofar as releasing Joslin from any damages PSC incurred by any delay; that it contends *this clause* permitted it to sue Joslin for any damages it sustained because *Joslin* did not have the tubes and headers *on the premises when* the contract *was entered* into.

We do not agree that it does. The clause states:

> "The contract is signed without "*any intent on the part of PSC* to waive any right it *may* have to *collect* damages *by reason of the late delivery* of material notwithstanding the provisions of Par. 1-05 of the specifications." (Italics ours.)

(a) Does not that simply mean, particularly when taken in conjunction with the entire contract, that if

Joslin, after PSC makes requisitions for material, makes *late delivery,* that PSC does not *intend* to waive any right to collect damages?

(b) That PSC, in signing the contract, gives notice that if it has any damages it is not *its* intent to *waive* it? It *does not* state that *Joslin agrees to* waive Par. 1-05, nor any of his rights. It is simply a clause of INTENT.

(c) It limits its claim to damages to *late delivery* of materials by Joslin. PSC *admitted* time and again that *Joslin promptly delivered all the material* he was to deliver. There was no late delivery.

It was only added after rejecting other proposed claims which would have changed Joslin's rights, and when the Government's attorney assured Joslin it "added nothing to the contract." (Tr. 578-579-549.)

(d) Appellant's Ex. 16 and Appellee's Ex. M and N (Tr. 570 et seq.) show that Joslin would not consent (nor could he bind the Government to any clause, which changed the contract (668).)

Wedlick's and Joslin's testimony shows they had no intention or authority to alter the terms of the contract. (Tr., supra, and 723.)

Second: Let's take the contract: It states:

> "Subcontractor (PSC) has *read* and is familiar each and every part of said subcontract. (Page 1 of Contract.)
>
> "*In consideration* of the subconstructor undertaking herein, the subcontractor shall receive *payment* for work performed in the *lump sum amount*

set forth in Article I hereof which *shall constitute full compensation for the performance* by the subconstructor of the work and services authorized herein."

Assuming the clause validity waives the restriction of Par. 1-05, (which is the only paragraph it refers to), and assuming further that Par 1-05 refers to not "late delivery" but to material on the site, is Joslin liable? The contract calls only for delivery of material by Joslin.

Specifications, Par. 5-04, state:

"All material * * * will be furnished by constructor (Joslin) * * * material * * * will be delivered to subconstructor (PSC) at points and in manner specified. b. Immediately after starting work * * * subconstructor shall prepare a 'list of materials' * * * in order that shortages may be immediately determined. Such shortages will then be reported to constructor, etc."

If a waiver of damages, does waiver of a paragraph of the specifications waive also the *balance* of the *contract,* particularly in view of *Art. V* of the Contract?, to-wit:

"It is further understood and agreed that all other terms and conditions of said subcontract shall be and remain the same."

PSC accepted the contract as written but it was in September, 1944, before this clause was signed. The contract was in full force and effect in the meantime and PSC had worked continuously under it and the specifications until most of the contract was completed.

We are familiar with the rule that a clause added to the contract may be under certain circumstances more controlling, but we do not believe it applies here for the following reasons:

(a) For the reasons set forth above.

(b) It applies only to a paragraph of the specifications—not the entire contract. It violates the clause that PSC agrees that all other terms and conditions of the contract remain the same.

(c) The clause is construed against the person drafting it.

(d) It would require the Court to make a new contract for PSC,—to read into it what PSC contends.

(e) The conduct, and consistent refusal of any changes that PSC sought to interpose for any additional compensation. (Tr. 579-420.)

(f) Joslin could not legally change the Government's basic contract, which PSC knew. (723-571-592-668.)

(g) There was no consideration for it. It accepted the lump sum as full compensation. (See following paragraph.)

Third: There was no consideration for the "clause".

(a) Par. 1-04 (not 1-05) states:

"The lump sum offered will be the basis of compensation of the offer."

(See Tr. 565 for explanation of lump sum contract.)

If the lump sum is the basis for the compensation what other consideration was there? PSC accepted the sum as *full compensation* (not price) and damages are part of compensation. What about the other contractors who bid on the contract and who were eliminated by PSC *accepting* this lump sum as compensation? What compensation could move *from PSC to Joslin* for the additional clause? What is Joslin's position after the contract was made?

(b) The contract was made by the offer and acceptance (July 11, 1944). Borst of PSC testified "He immediately proceeded to work under the contract". There was no other consideration.

(c) *Our questions* as to what consideration PSC claimed for the clause were answered vaguely. However, Borst did state that, in effect, the only consideration was a "going forward with the execution", but he admitted he never mentioned that to Joslin. (519.) It was only in his *mind*. The Court has a right to consider this only as an *afterthought*.

We cross-examined Borst fully on the subject of consideration. (Tr. 421-519-520.) There was no direct examination on this. We asked him if there was anything to indicate, either in writing or orally, anything that implied a consideration or a benefit, and the only answer was the above. Joslin denied any consideration. (Tr. 701.)

Consideration, in its broadest terminology, is a *benefit conferred* or *agreed* to be conferred.

Where is the benefit conferred or agreed to be conferred? There was no agreement. Joslin received no benefit. He would not suffer if USC had put the "thought" into action and stopped the work.

(d) If the clause enlarges PSC's rights, it in turn gave nothing to appellee—it promised nothing—appellee received nothing. PSC suffered no prejudice nor did it agree to suffer any prejudice as an inducement to appellee to sign it. It is void for want of consideration. See *Burner v. American Bar Q. Min. Co.,* 76 Cal. App. 774. *Cuneo v. Claybourn,* 90 F. (2d) 235 cited by PSC.

(e) The bids were made on the specifications. Nothing was added that PSC was not paid for or agreed to do.

(f) Joslin did everything he was supposed to do under his contract.

(g) PSC had already been awarded the contract and performed most of the contract.

Fourth: The first time that PSC claims Joslin breached the contract was September 7, 1945, (the contract was made July 11, 1944), and that in a letter not addressed to him. Yet the specifications clearly state (*1-05 (b)*):

> "*Immediately* after starting work under the subcontract, the subconstructor (PSC) *shall prepare a list of materials, * * * in order that shortages may be immediately determined.* Such shortages will be *immediately* reported to the *constructor* (Joslin) for use in *obtaining* the *balance* of *ma-*

terial required for the completed work * * * the *subconstructor* will be *responsible* for *advising the constructor* of his *requirements* * * *''. (Italics ours.)

Certainly PSC did not do this, although requested several times. (Tr. 451-457.) It knew it had to do so (Tr. 523), and relied entirely on the specifications. (Tr. 407.) It was requested several times to get in the inventory. (455-8.)

Fifth: Is not PSC estopped from claiming an alleged breach of contract?

(a) By the above clause.

(b) PSC requested extension of time to December 5, 1944. (Tr. 589-681.) It then refused it perhaps because it could not be penalized for delay.

(c) It continued on with the contract after it stated it knew that there was a shortage of walls and headers and after Joslin notified PSC that he would not and could not alter the contract.

(d) It never claimed any breach of contract or damages from Joslin until after its claim was rejected by the Government.

(e) It failed to do what it was required to do by its contract, to-wit make an *immediate* inventory for the purpose of *ascertaining the shortages.*

(f) It was stipulated the only "late delivery" (see clause) alleged by appellant was a shortage of tubes and headers but the first requisition put in by PSC

was on August 17, 1944, and was for either *furnace* tubes, or *boiler* tubes. (Tr. 663.) It said its first delay was Aug. 17 or 29. (Tr. 451.)

(g) PSC could easily have protected itself before putting in its bid and before "freezing out" the other contractors. It could have requested a change in the contract or the addition of a clause, but it took the contract "as is".

Sixth: Assuming that: (a) Appellant is not barred by the contract, or any of its clauses, for claiming damages; (b) that there was a consideration for the clause; *then what was the breach by Joslin claimed by PSC?*

It is agreed that Joslin was not in fault in procuring any material; also that he did not make any "late deliveries" but that they were furnished promptly. (518.)

It is *not* that water walls and headers were not *delivered* as *contracted* for by Joslin, but *that they were not on the premises.* That neither PSC nor Joslin knew what was on the premises at the time the contract was entered into. (581-7.)

Where can such an agreement be found in the contract?

PSC says it in Par. 5-04 (c), to-wit:

> "*Nearly all* of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto".

We contend that "nearly all" means what it says. The evidence shows that nearly all of the material was there. That less than 1½% of the material was not stored there. This 1½% is figured in dollars as is the custom and to which PSC agrees. (Tr. 408-410.)

Yet appellant claims it "understood" by the term "nearly all" *to mean that all essential and necessary material for immediate construction was on the site.* It had to so understand it, to claim a cause of action.

Would not this require the Court to misinterpret a common, ordinary phrase, or change its terms? Would it not require a change of a meaning from that which is clear, unambiguous and certain and so understood by all the other bidders and we believe appellant, because realizing that it is clear, it asked the Court in its second cause of action to reform specifically that clause so as to state:

> "Not all essential and necessary materials required for the construction of the boilers were then in storage at the project. * * *."

Seventh: If Paragraph 1-05 is eliminated, as contended by PSC—then there is no completion date and PSC has not been delayed under the contract, (Tr. 592, et seq.) PSC can not exclude part and accept part.

Eighth: Contracting officer's findings. The cases cited may be distinguished by the Court believing it was an arbitrary finding and a different contract than the one before the Court. However, be it as may, PSC would be also bound by the findings, among others, (a) its claim for only $10,008.70, (b) its denial, (c) the

duty of PSC to make a list of material (257), (d) that list showed missing *tubes after* it was started (258), (e) that because of the missing material the contract was worded "nearly-all" (259) what tubes were there (260) and enough for one boiler (262) delivery of tubes may not be the sole reason for delay (264). We do not recall it being admitted in evidence but is, we think, Exh. 45 for identification. There is a great deal of other findings, among them that Joslin furnished all material as fast as possible. If Joslin is bound, then so is PSC.

Ninth: No breach by Joslin.

PSC case is based on the fact that part of the tubes and headers were not on the premises at the time the contract was signed. The evidence shows that Joslin never stated what was on the premises. That Borst admitted requisitions were filled by Joslin within a "matter of hours or in 2 or 3 days". There was no fraud—no mistake (except, perhaps, on the part of PSC which thought that "nearly-all" meant tubes and headers). In view of the fact that PSC was to make an inventory to ascertain the shortages, it was an assumption that is contradicted by the contract. If some person, other than Joslin or an authorized agent of his, thought the materials were there and were not, it is not binding on him. If above is true, the non-suit should have been granted.

IF APPELLANT IS ENTITLED TO DAMAGES—DID TRIAL COURT ERR IN NOT AWARDING APPELLANT MORE OR LESS DAMAGES?

1. If appellant was entitled to damages, we contend it should be awarded $1.00. PSC contends it should be $34,326.88.

PSC first objects to trial Court's findings and conclusions that its damages are limited to $10,008.70. The trial Court, regardless, found it only damaged in the sum of $3,753.15.

Briefly, the facts are that when PSC was given its final payment on this contract, it gave Joslin a letter dated March 18, 1946, as follows:

> "Final payment on subcontract * * *." (The one before the Court.)
>
> "Payment in full, exclusive of outstanding claim of PSC which has been submitted to the Chief of Engineers for decision." (Tr. 574, et seq.)

It is *admitted* that the claim submitted to the Chief of Engineers was for *$10,008.70.* That there was *no other claim.* (Tr. 430-431.) We feel no other comment is necessary. We go even further, and say it appears that if the Chief of Engineers denied the claim, which it did, that this constituted final payment for everything. It was the intent of this letter as appears therein.

U.S. v. Clyde, 80 U.S. 35.

PSC finds no answer to this in its brief (P. 14-17) other than its statement that (besides appellee's denials) he pleaded a bare estoppel-release—and waiver.

Under the liberal rules of pleading, we believe the pleadings are sufficient if no objections were made. No objections were made in the trial Court and the case was tried under the pleadings. PSC had ample ways and means in the trial Court if it had any objection to the pleadings, to strike, make more definite, or to find out what the defenses were, if not satisfied.

2. Was appellant entitled to more or less damages?

(a) There is admittedly a conflict in the testimony; however, if sufficient evidence is found in the record to support the trial Court's findings we believe the law is that the trial Court will be sustained.

(b) Appellee took the testimony of appellant and by his analysis thereof showed that any delay in completion was due to appellant's own fault. Because of the nature of the testimony it would be unfair to pick out certain portions of the testimony, but it is submitted that the testimony from 595 to 672-674 to 712 and the cross-examination following shows that, taking PSC's own progress or construction schedule (Exh. 62) (which shows the work it intended to do at certain times), it could have completed its work without any delay. (Exh. P-Q-R-S-T-U-V-W-X - Exh. 62.) It is our opinion that the trial Court gave considerable attention to the testimony of appellant and appellee relative to these charts.

Exh. R-S-T-U-V may be considered only in its relation to delay as to tubes and headers, the only matter before the Court.

PSC contends that it is a fact that the tubes were required on August 1, 1944 (P. 23), yet PSC admits it did not get the list of tubes until August 22 (Tr. 447) and that its requisition was made August 19 for furnace tubes (449); that its first delay was August 29 or 17 (451) and under date of August 31 wrote Joslin that the tubes were checked and requisition issued. (461.)

PSC contends (P. 24-25) that Court erred "because the appellant didn't do what it should have done". In other words, even if PSC could have finished the work in 7 days, the Court was in error because PSC delayed completion for 38 or more days.

PSC contention (P. 25) that Court erred on Boiler #3, fails to take in the complete testimony including its own failures.

Appellee in the testimony cited did not concede the delay but merely *that PSC own construction schedule showed* it should have completed October 14 and did complete it on October 2. The difficulty in pointing out only a particular part of the transcript, is illustrated by PSC quoting only part of the answer in support of its contention. Joslin testified PSC was on schedule on October 27 (632).

PSC states all parties agree that delivery on Boiler #3 was 41 days late (last line P. 27). This is vigorously denied. We contend there was no late delivery; that all material was promptly delivered when Joslin was notified. Appellee admits the delivery of certain material on certain dates. PSC states its testimony

shows "the non-delivery of materials were unreasonable". All material was delivered and the testimony of even PSC shows it was not delivered at unreasonable times.

The material not there had to be formally requisitioned. Mr. Borst stated (Tr. 411) "It was not available without a formal requisition".

Items of Damages.

The attorney for appellee confesses he is not an expert on the figures as to these damages and will try to limit it only to those figures he thinks he knows.

It appears to us that appellant is limited by its claim filed with the Chief of Engineers for $10,008.70 as it acknowledged *full payment of all other claims.*

This claim was divided into two parts:

(a) *increased cost of renting equipment,*

(b) *increased cost of supervisory personnel.*

As to (a): PSC claims $2,255.50. The evidence offered was vague — hearsay — secondary — and no proper foundation. Our objections were, we believe, sustained. (Tr. 267-275.) If not, the Court gave little, if any, weight to it. It appears, further, it was rented from its alter ego, Fegels Construction Co. (405-483-511.) It further appears that the rental was not necessary after November 10, 1944.

As to (b): PSC claims $8,267.53 for this item. The number of employees, we perceive, were 9. (Tr. 437, et seq.) It appears PSC and Fegels Construction Co. were alter egos as far as this matter is concerned

(supra). Objections were made that Borst was not qualified, which were sustained. (Tr. 286-297.) We believe the evidence on this was so vague—not properly identified or foundation laid—and not within the contemplation of the parties, that it should either be rejected or given little weight. The trial Court from its remarks apparently agreed, stating: " * * * it seems impossible to the Court" (296). "It is hard for the Court to believe that the witness can testify to matters that he is being interrogated about." (297). Mr. Borst was, we believe, an engineer supposedly on the job at Sunflower and it would seem difficult for him to testify as to the two corporations, and the numerous details thereof. As a matter of fact, he had to be assisted by his attorney. We believe little, if any, weight should be given to this item. The foundation of the treasurer of PSC's testimony was also viewed doubtfully, to-wit, "* * * I will say I hardly believe that statement" (360); also "That is quite a remarkable bit of evidence. As the saying is, he certainly was some man to testify all that independent of any records." (360).

Generally:

(a) The Court may agree that PSC did not have sufficient equipment for the work; that if 95-73/100% was completed October 27, the balance should have been completed November 12, 1944; that PSC was not diligent in ascertaining the shortages; that even if delayed, PSC could have advanced other work; that it is accepted practice in such a contract (with no

penalty for completion) that some delays will occur, and is an inherent hazard;

(b) As to the expense of Borst that he had other contracts and stated he had to be on the job until December 15, 1944 to sign *change orders;*

(c) That Joslin's testimony shows no loss of efficiency, and that knowing a shortage, PSC should have had a plan in case of delay.

APPELLANT'S BRIEF: PAGE 15 (3) AMOUNT OF DELAY ON BOILERS 1, 2, 3.

The findings of the Court are more favorable to appellant that the evidence warrants.

The appellant claims that it required the "Water Wall Tubes" on August 1st and its first notice in this regard was dated July 26, but it did not contain definite information as to just what "Water Wall Tubes" were short.

The contract required "requisitions" for material sufficiently in advance to enable appellee to procure it. (R. 83.) The requisitions should sufficiently identify the material so that it could be procured. However, appellant's first requisition for "Water Wall Tubes" was issued on August 19, which was the first specific information given as to what particular "Water Wall Tubes" were needed. (R. 447-449.) Appellant admits appellee made every effort to procure material as soon as requisitions were made (R. 519 and 659.) Appellant depended on others to determine what it actually needed. (R. 734.)

The Exhibits Nos. 50 to 64 (Progress Schedules) show that the "Tubes, Water Wall Headers and Water Wall Tubes" were 99.9% complete on Boiler No. 1; 99.8% complete on Boiler No. 2 and 99.7% complete on Boiler No. 3 on October 22, and said schedules show that no further work was done on this phase of the contract between October 22 and November 12. (R. 650-652.) Had appellant maintained its own proposed percentage of completion per day as set out in its progress schedules, it would have completed its contract by November 10, 1944 (R. 595-636, Ex. 62; R. 658-659), with the exception of the "Dry-out and Boil out" process, which phase was eliminated from the completion of each boiler.

The Court's findings as to the extent of delay on the boilers is based upon the testimony of W. E. Joslin, appellee. (R. 599-601.)

However, appellant is trying to charge appellee for its own delay. The absence of materials did not cause a lay off of help or suspension of work. (R. 1, 506.) After September 20, 1944 (date last Water Wall Tubes were delivered) no additional boiler makers were employed to catch up with the construction schedules (R. 1, 673; 473); there was very little labor "turn over" and only one Sunday (September 3) when a sizable crew worked (R. 1, 471-476; 491) and at no time did appellant employ a double shift although its contract called for it, if necessary. (R. 1, 498-499; 658-659.)

Between October 15 and 29 it reduced its force by over 63% (see payroll record). When appellant sub-

mitted its proposed progress schedule, it was behind in the amount of the over all work it proposed to do and continued behind its own proposed schedule to the end of the job. (R. 499.)

It took over eight weeks to complete the inventory which was one of the first things appellant was supposed to do (R. 445-447) and this delay caused repeated requests to get the inventory completed. (R. 449; 451-459; 462.)

Additions to the contract entitled appellant to additional time of five days to complete which automatically extended the time to November 15 instead of November 10 (R. 502-505; 658) but appellant refused the extra time to aid in its claim for damages.

The record is replete with evidence that from the day (July 13, 1944) when appellant was awarded the contract and thereby eliminated competition, it began a studied effort to obtain extra money under its contract (R. 663) which continued throughout. (R. 1, 713, Ex. 7; R. 588, Ex. 9; Ex. 16; Ex. 18; R. 505.) Had appellant spent half as much energy in completing its contract, it could have finished well within the allotted time.

"S" CURVE.

Appellant devotes considerable effort in its brief (pp. 28-29) to show that the "S" curve on Exhibits Nos. 50 to 64 support its contention that it was prevented from completing its contract within its own proposed estimate of time. The "S" curve (R. 747;

771) is just an estimate and as drawn on the Exhibits 50 to 64 is not a true reflection of the evidence submitted because after it was set up on the proposed progress schedules, Item No. 8 of Segment III, Boiler No. 1 entitled "Dryout and Boil Out" process (being also the same process as is covered by Item No. 10 on Boiler No. 2 and also Item No. 11 on Boiler No. 3) was deleted on all three boilers from the contract, but the "S" curve was never corrected to reflect these omissions. This Item No. 8 represents $3,600.00 or 6% of the Segment III, Boiler No. 1 which is set up at $59,850.00 in appellant's breakdown (Exs. Nos. 50 to 64) and which appellate had allocated 27 days in its "S" curve to complete. The "S" curve also reflects 20 days for the same operation on Boiler No. 2 and 21 days for the same operation on Boiler No. 3; while these are simultaneous operations they make it appear that appellant had more work to perform at the end of its contract than really existed. These three items constitute 2.4% of appellant's entire contract which were deleted and still appellant contended it was entitled to some 14 days to complete its last 5% while obviously the last days were to catch up for delays which occur in any contract of this magnitude.

APPELLANT'S POSITION INCONSISTENT.

There is no dispute that the only place in the entire contract which fixes the completion date is Par. 1-05 (R. 87) and without which there would be no time limit of 120 days and consequently no possible basis

for damages; however, appellant is in the unique position of contending in one breath that it disregards the provisions of paragraph 1-05 of the contract (R. 102; Ex. 2) which denies "damages" and in the next breath depends on other provisions of the same paragraph 1-05 which designates the 120 days for completion.

In other words, the clause it added to the contract (R. 89(c)) broadly takes exception to the whole of Par. 1-05, but to sustain its position, appellant uses some and rejects other provisions of this Par. 1-05. Appellee did not consider that the added clause changed the contract. (R. 592-593.)

Dated, San Francisco, California,
December 22, 1948.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

RUDOLPH J. SCHOLZ,
Assistant United States Attorney,

Attorneys for Appellee.